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APPENDIX "A"

AZTEC STEEL COMPANY, A. F. S. C. O., Inc., Atlantic Steel Fabricators, Inc., Fairmont Steel Corporation, etc., et al.,
Plaintiffs-Appellants,

v.

FLORIDA STEEL CORPORATION, et al.,
Defendants-Appellees.

No. 81-5961

Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.

Nov. 4, 1982.

Plaintiff brought antitrust action. The United States District Court for the Middle District of Florida, George C. Carr, J., dismissed the suit for wilful failure to comply with court-ordered discovery, and plaintiff appealed. The Court of Appeals held that the district court did not abuse its discretion in dismissing antitrust action after finding that plaintiff had knowingly and wilfully failed to comply with court-ordered discovery

and that sanctions less severe than dismissal would be ineffective.

Affirmed.

Appeals from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, FAY and CLARK, Circuit Judges.

PER CURIAM:

This case arises out of the dismissal under Fed.R.Civ.P. 37(b)(2) of appellant's antitrust action for willful failure to comply with court ordered discovery. We affirm.

In 1975 appellants Aztec Steel Company, A. F. S. C. O. Inc., Atlantic Steel Fabricators, Inc. and Fairmont Steel Corporation (hereinafter collectively referred to as Aztec) filed suit against Florida Steel Company, LaClede Steel Company and Bethlehem Steel Corporation.[1] Aztec charged the steel companies with a wide array of antitrust violations.

In 1977 both Bethlehem and LaClede served interrogatories on Aztec. Aztec's answers were both

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[1]In the original complaint Georgetown Steel Company and Owen Steel Company of Florida were included as defendants. Private settlements resulted in the dismissal of Georgetown and Owen in 1977.

evasive and incomplete. When Bethlehem and LaClede were unable to negotiate complete answers, they filed motions to compel. A magistrate granted the motions and Aztec eventually filed supplemental answers. Bethlehem and LaClede subsequently filed a second motion to compel, claiming that Aztec's answers remained inadequate. The magistrate granted the motion, and Aztec filed another set of supplemental answers. In 1980 Bethlehem and LaClede moved to dismiss, asserting that Aztec's answers to their interrogatories remained incomplete. Florida Steel filed a joinder to the dismissal motions.

In a hearing before the magistrate Aztec asserted for the first time it was unable to supply complete answers. The magistrate rejected Aztec's claims of good faith and found that it had willfully and knowingly failed to comply with the court's orders. The magistrate recommended that the action be dismissed.

The district court agreed that Aztec had willfully flouted court ordered discovery. The court noted that Aztec's "facile protestations of good faith are simply not borne out of the total record. To the contrary, [its] history of broken promises to Magistrate Game and [its] failure to provide the defendants with basic information in the six years this case has been pending evidence a willful disregard for the Court, the discovery process, and the opposing parties." *Atlantic Steel Fabricators, Inc. v. Florida Steel Corporation*, No. 76-320 Civ-T-GC, op. at 3 (D.Fla. Aug. 25, 1981). After considering the inefficacy of lesser sanctions, the district court dismissed Aztec's claim against Bethlehem, LaClede and Florida Steel. Aztec subsequently settled with

Bethlehem and LaClede. From the dismissal in favor of Florida Steel, Aztec appeals.

[1-4] The standard review for a Rule 37(b) dismissal is not whether the reviewing court would, as an original matter, have dismissed the action; it is whether the district court abused its discretion in dismissing the action. *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 642, 96 S.Ct. 2778, 2780, 49 L.Ed.2d 747 (1976). Dismissal will not be upheld if a party's failure to comply is due to inability rather than to willfullness, bad faith or disregard of responsibilities. *Jones v. Louisiana State Bar Association*, 602 F.2d 94 (5th Cir. 1979).[2] When a party demonstrates a flagrant disregard for the court and the discovery process, however, dismissal is not an abuse of discretion. *Emerick v. Fenick Industries, Inc.*, 539 F.2d 1379 (5th Cir. 1976). In reviewing the district court's ruling one consideration is whether a less drastic but equally effective remedy could have been fashioned. *Jones v. Louisiana State Bar Association*, 602 F.2d at 97. In the instant case the court found that Aztec knowingly and willfully failed to comply with court ordered discovery and that sanctions less severe than dismissal would be ineffective. We are unwilling to conclude that the district court abused its discretion.

[5] Aztec contends that the dismissal of its claims against Florida Steel was improper because Florida Steel did not propound any interrogatories. This argument disregards the institutional values Rule 37 is designed

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[2]Fifth Circuit cases handed down prior to September 30, 1981, are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

to protect. Rule 37 sanctions are imposed not only to prevent unfair prejudice to the litigants but also to insure the integrity of the discovery process. Aztec's contumacious conduct justified the district court's dismissal of the entire action. If we were to hold otherwise, "other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other District Courts." *National Hockey League*, 427 U.S. at 643, 96 S.Ct. at 2781.

AFFIRMED.

APPENDIX "B"

[Received AUG 29 1980]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

No. 76-320 Civ.T.-GC

ATLANTIC STEEL FABRICATORS, INC., etc., et al.,

Plaintiffs

vs.

FLORIDA STEEL CORPORATION, etc., et al,

Defendants

REPORT AND RECOMMENDATION

Before this Court are Defendant Bethlehem Steel Corporation's Motion to Dismiss pursuant to Fed.R.Civ.P. 37(b)(2), Motion of Laclede Steel Company to Dismiss, and Joinder of Florida Steel Corporation in Motions of Bethlehem and Laclede for Imposition of Sanctions against Plaintiffs. Upon consideration of the extensive memorandum submitted by the parties, the oral arguments of counsel and a review of the chronology of the progress of the discovery in this cause (see Exhibit "A" attached), I recommend that the Motions to Dismiss of the respective Defendants be granted.

Defendants Bethlehem Steel Corporation and Laclede Steel Company served interrogatories on Plaintiffs in April and May, 1977. It was not until five months later that any initial responses were received to these interrogatories, and these responses could be described as inadequate at best. Pursuant to the Local Rules, a meeting was held between counsel for Plaintiffs and Defendants in November, 1977, to discuss the sufficiency of Plaintiffs' responses and Plaintiffs' objections to the interrogatories. Despite assurances of the cooperation of counsel, it became necessary for Defendant Laclede to file a Motion to Compel in April, 1978, and Defendant Bethlehem to file a Motion to Compel in July, 1978, this Court granted Defendant Laclede's Motion to compel, and ordered Plaintiff to furnish responses not later than October 15, 1978. In a second order filed September 19, 1978, this Court granted Bethlehem's Motion to Compel, and ordered Plaintiff to respond to Defendant Bethlehem's interrogatories by November 1, 1978.

Plaintiff's second set of responses to the respective Defendants' interrogatories again proved to be inadequate, and Laclede filed a second Motion to Compel in March, 1979, while Bethlehem filed its second Motion to Compel in June, 1979. These motions were heard by this Court in June, 1979. On November 26, 1979, an order was entered granting each of the Defendants' Motions to Compel, and at the same time the Plaintiffs were admonished that "all parties plaintiff shall proceed expeditiously with the discovery, or the Court will consider imposition of sanctions provided for in Rule 37(b)(2)(c)."

Supplemental Responses were served on both Defendants in January, 1980, but these turned out to

be no more adequate than the previous responses had been. It was then that Defendants filed their individual Motions to Dismiss.

I find that Plaintiffs' repeated failures to comply with this Court's orders compelling Plaintiffs to provide full and complete answers to Defendants' interrogatories are knowing and willful and represent intentional disregard to Plaintiffs' obligations to this Court and to the Defendants. This Court's imposition of the sanction of outright dismissal of the above styled cause for failure to comply with discovery orders is consistent with the position that:

> ". . . the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976).

Additionally, it is hereby recommended that Defendants be awarded their expenses, including attorneys' fees, incurred in connection with the preparation and filing of the motions which are the basis of this order.

This 14th day of August, 1980, at Tampa, Florida.

/s/Paul Game, Jr.
PAUL GAME, JR.
UNITED STATES MAGISTRATE

"EXHIBIT A"—CHRONOLOGICAL CHART OF EVENTS

	Interval of Days Elapsed	Cumulative Days Elapsed Since Filing Complaint	Cumulative Days Elapsed Since Interrogatories Filed
(1) Complaint & Summons (12/15/75)			
(2) Amended Complaint (1/12/76)	28	28	—
(3) Bethlehem's First Interrogatories to Atlantic, AFSCO, Bay, Fairmont and Aztec (4/29/77)	472	500	0
(4) Stipulation for Extension of Time (Extension for Plaintiffs to Answer Bethlehem's Interrogatories to 9/1/77) (7/15/77)	77	577	77
(5) Plaintiffs' Answers and Objections to Bethlehem's First Set of Interrogatories (10/18/77-11/7/77)	115	692	192
(6) Plaintiffs' Conference Agreement to Supplement Interrogatories (11/11/77)	4	696	196
(7) Order Setting Discovery Cut-Off for 4/1/79 (1/31/78)	81	777	277
(8) Plaintiffs' Supplemental Answers to Bethlehem's First Set of Interrogatories (5/2/78-5/22/78)	111	888	388
(9) Motion & Memorandum of Bethlehem to Compel Discovery by Plaintiffs in Response to First Set of Interrogatories (7/19/78)	58	946	446

"EXHIBIT A"—CHRONOLOGICAL CHART OF EVENTS
(Continued)

	Interval of Days Elapsed	Cumulative Days Elapsed Since Filing Complaint	Cumulative Days Elapsed Since Interrogatories Filed
(10) Order Compelling Plaintiffs' Production of Documents and Answers to Interrogatories (9/19/78)	62	1,008	508
(11) Plaintiffs' Answers and Supplemental Answers to Bethlehem's First Set of Interrogatories (11/2/78)	44	1,052	552
(12) Order Setting Discovery Cut-Off for 12/31/79 (2/15/79)	105	1,157	657
(13) Fairmont's Supplemental Answers to Bethlehem's First Set of Interrogatories (5/14/79)	88	1,245	745
(14) Defendant's Motion for Order Requiring Each Plaintiff to File a Detailed Statement of Its Theory of Impact, Damages & Means of Calculating Damages & Memorandum Supporting Same (6/6/79)	23	1,268	768
(15) Motions of Bethlehem Steel to Compel Plaintiffs to Answer Bethlehem's First Set of Interrogatories & For Sanctions, Including Award of Expenses (6/1/79-6/7/79)	1	1,269	769

"EXHIBIT A"—CHRONOLOGICAL CHART OF EVENTS
(Continued)

	Interval of Days Elapsed	Cumulative Days Elapsed Since Filing Complaint	Cumulative Days Elapsed Since Interrogatories Filed
(16) Hearing on Discovery Motions Before Judge Game (6/20/79)	13	1,282	782
(17) Order Granting Laclede's and BSC's Motion to Compel (11/26/79)	159	1,441	941
(18) Motion for Extension and Memorandum in Support Thereof (12/6/79)	10	1,451	951
(19) Order Granting Extension of Time (20 days) (12/11/79)	5	1,456	956
(20) Order Setting Indefinite Discovery Date (1/10/80)	30	1,486	986
(21) Plaintiffs' Second Supplemental Answers to Bethlehem's First Set of Interrogatories (1/15/80)	5	1,491	991
(22) Bethlehem's Motion to Dismiss Pursuant Rule 37(b)(2) Memorandum in Support Thereof (3/8/80)	53	1,544	1,044

APPENDIX "C"

[RECEIVED AUG 31 1981]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 76-320-Civ-T-GC

ATLANTIC STEEL FABRICATORS, INC., etc. et al.,

Plaintiffs,

vs.

FLORIDA STEEL CORPORATION, etc., et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

The defendants in this case have moved to dismiss pursuant to Fed.R.Civ.P. 37(b) because the plaintiffs have failed to produce court ordered discovery. The defendants' motions were referred to Magistrate Game who has filed a Report and Recommendation in which he recommends that the motions be granted. Based upon an independent review of the court file, the parties' memoranda, the proceedings before Magistrate Game, and the applicable law, I find that dismissal of this action is warranted. Accordingly, for reasons set out more fully below, the motions to dismiss are granted.

I.

The plaintiffs filed this action in 1975 charging the defendants with a wide array of anti-trust violations. In 1977, the defendants filed their first set of interrogatories. Five months later, the plaintiffs filed their answers to these interrogatories. When the defendants were unable to negotiate more complete answers to these interrogatories, they filed motions to compel. Magistrate Game granted the motions and the plaintiffs eventually filed supplemental answers. Thereupon the defendants filed new motions to compel, once again claiming that the filed answers were insufficient.

Significantly, the plaintiffs did not file any opposition to these motions. Rather, at a hearing before Magistrate Game they argued, as they had on previous occasions, that their failure had been due to their lack of funds and their inability to formulate—and pay for—a computer program to synthesize the discovery material. However, the plaintiffs did not assert that they could not answer the interrogatories without the aid of a computer. They merely stated that computerization would be a more efficient way to retrieve and synthesize the discovery material and, therefore, would be helpful to all parties. Consequently, they assured Magistrate Game that they could, and would, answer the interrogatories.

In an Order dated November 25, 1979, Magistrate Game granted the motions to compel and, finding that the filed answers were "evasive, incomplete and non-responsive," directed the plaintiffs to "fully, completely and with specificity" respond to the interrogatories.

Magistrate Game also specifically warned the plaintiffs that a failure to comply with the Order could result in Fed.R.Civ.P. 37(b)(2)(c) sanctions.

The plaintiffs filed supplements to their answers in January, 1980. Thereafter, the defendants filed the motions to dismiss which are presently before the Court. In support of these motions, the defendants argued that the plaintiffs' supplemental answers were inadequate and, thus, in violation of Magistrate Game's November 25th Order.

The plaintiffs have opposed the motions by arguing that their answers are as complete as they could be and that any insufficiency is due to their inability to supply fuller answers, not their disregard of their discovery responsibilities. In his Report and Recommendation which was issued after a hearing on the motions, Magistrate Game rejected the plaintiffs' claims of good faith and found that the plaintiffs' failures were "knowing and willful and represent[ed] intentional disregard to Plaintiffs obligations to this Court and to the Defendants."

This finding is amply supported by the record. Despite considerable out-of-court negotiation and numerous court orders, the plaintiffs have yet to file adequate answers to the defendants' *first* set of interrogatories. Instead, notwithstanding Magistrate Game's specific warnings, the plaintiffs have chosen to file stock answers to the interrogatories which, in large part, merely rehash answers that the magistrate found inadequate three years ago. Moreover, the plaintiffs have not shown why they cannot produce the basic

information that has been requested. Significantly, until they were faced with motions to dismiss, the plaintiffs had repeatedly promised Magistrate Game that they were able to, and would, answer the interrogatories in full and requested only that they be given more time to computerize the information. Consequently, the plaintiffs' recent assertion of an inability to comply is not persuasive.

In sum, the plaintiffs' facile protestations of good faith are simply not borne out by the total record. To the contrary, their history of broken promises to Magistrate Game and their failure to provide the defendants with basic information in the six years this case has been pending evidence a willful disregard for the Court, the discovery process, and the opposing parties.

II.

Having determined that the plaintiffs willfully disobeyed court orders, the question becomes what sanction is appropriate. *See Marshall v. Segona*, 621 F.2d 763, 768-69 (5th Cir. 1980). Fed.R.C.P. 37(b) authorizes the imposition of sanctions "as are just." Among available sanctions, Rule 37(b)(2)(c) provides for an "order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party." Magistrate Game has recommended dismissal of this action as well as an award of expenses.

The Supreme Court has approved the imposition of dismissal as a sanction for failure to provide court

ordered discovery. *National Hockey League, et al v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) (per curiam). Reasoning the Rule 37 sanctions serve not only to punish the recalcitrant party but also to deter others from similar behavior, the Court in *National Hockey League* held that Rule 37(b) dismissal of a private anti-trust action was appropriate where, as here, the plaintiffs' failures were found to be willful. Similarly, although the Fifth Circuit has been reluctant to impose the "draconian remedy of dismissal" in Rule 37(b) situations, *Bonaventure v. Butler*, 593 F.2d 625, 626 (5th Cir. 1979), the Court has nonetheless affirmed dismissal in cases of willful disregard of court orders. *E.g., Jones v. Louisiana State Bar Association*, 602 F.2d 94 (5th Cir. 1979). *See Emerick v. Fenick Industries, Inc.*, 539 F.2d 1379 (5th Cir. 1976).

On the facts of this case, it is difficult to see how a less severe sanction than dismissal would be effective. The discovery requested is basic to the plaintiffs' case as well as the defendants' defense thereby making it impossible to isolate and strike out a portion of the pleadings to which the discovery is directed. In addition, the plaintiffs have been given ample opportunity to produce the information so that staying further proceedings would not be appropriate. Furthermore, as noted above, the plaintiffs have made no showing to substantiate their allegations of an inability to comply. Consequently, although dismissal is "the ultimate sanction", *Griffin v. Aluminum Co. of America*, 564 F.2d 1171, 1173 n.3 (5th Cir. 1977), it is appropriate in this case to insure the integrity of the discovery process and to deter others from disregarding discovery orders issued by the magistrates of this Court.

For the same reasons, dismissal is appropriate as to all defendants and not just those who filed the interrogatories. Rule 37(b) sanctions are imposed for failures to comply with court orders. Accordingly, it is not fatal to the defendants' motions to dismiss that the plaintiffs are not technically in default with regard to Florida Steel. They are in default with regard to Magistrate Game's orders. *See generally Denton v. Mr. Swiss of Missouri, Inc.*, 564 F.2d 236 (8th Cir. 1977).

In addition to dismissal, Rule 37(b) allows for an award of expenses, including attorney's fees, caused by a party's failure to comply. The rules mandates such an award unless the failure was substantially justified or awarding expenses would be unjust. Thus, an award is not required merely because the sanction of dismissal has been imposed. *See* 8 Wright & Miller, Federal Practice and Procedure, §2284 (1970).

Although the plaintiffs' failures were not substantially justified, it nonetheless would be unjust to award expenses in this case. The most drastic sanction available to this Court—dismissal—has been imposed. It is difficult to see how awarding expenses in addition to dismissing the case would, in a qualitative sense, further sanction the plaintiffs' noncompliance or deter others from similar behavior. Moreover, it is significant that the plaintiffs are relatively small companies who have expended a considerable amount of money on this litigation. While the plaintiffs' comparative lack of resources is insufficient to excuse their noncompliance, it bolsters the conclusion that an award of expenses against these plaintiffs would not be just.

III.

Based on the foregoing, it is accordingly ordered that the defendants' Motions to Dismiss be GRANTED and that this action be dismissed with prejudice, each party bearing its own costs.

DONE AND ORDERED in Chambers in Tampa, Florida, this 25TH day of August, 1981.

/s/ George C Carr
UNITED STATES DISTRICT JUDGE

APPENDIX "D"

Fed.R.Civ.P. 37(a) and (b). Failure to Make or Cooperate in Discovery: Sanctions

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorneys' fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply with Order.

(1) *Sanctions by Court in District Where Deposition is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.